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Nos. 08-289 & 08-294

In the
Supreme Court of the United States

SPEAKER OF THE ARIZONA
HOUSE OF REPRESENTATIVES and
PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND EVERGREEN FREEDOM FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. By interpreting the phrase "appropriate action" under Section 1703(f) of the Equal Education Opportunity Act as a requirement that the State of Arizona provide for a minimum amount of funding specifically allocated for English Language Learner programs statewide, did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state governments to determine how to appropriately manage and fund their public education systems?

2. Should the phrase "appropriate action" as used in Section 1703(f) of the Equal Education Opportunity Act be interpreted consistently with the No Child Left Behind Act of 2001, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and Evergreen Freedom Foundation respectfully submit this brief amicus curiae in support of Petitioners Speaker of the Arizona House of Representatives and President of the Arizona Senate.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF attorneys have represented amici in this Court in recent education cases, including *Fitzgerald v. Barnstable Sch. Comm.,* 129 S. Ct. 788 (2009), and *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007). PLF has participated as amicus curiae in numerous state supreme courts in support of states' education innovations, including in the pending Florida Supreme Court case of *Sch. Bd. of Palm Beach County v. Survivors Charter Schs, Inc.*, No. SC07-2402. PLF attorneys also represented amici in *Alexander v. Sandoval*, 532 U.S. 275 (2001), wherein this Court upheld a state's administration of certain English-only policies. In addition, PLF attorneys have been instrumental in defending Proposition 227, the sister

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[1] Pursuant to this Court's Rule 37.3(a), counsel for all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

initiative to Arizona's Proposition 203. Both voter initiatives replaced bilingual education programs with programs designed to teach students in English. PLF attorneys participated in *Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002) (representing parents of English learners); *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998) (representing the California State Board of Education); and *California Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141 (9th Cir. 2001) (representing parents of English learners).

The Evergreen Freedom Foundation, founded in 1991, is a nonpartisan, public policy research organization with 501(c)(3) status, based in Olympia, Washington. The Foundation's mission is to advance individual liberty, free enterprise, and limited, accountable government. Through its Education Reform Center, the Foundation seeks to give every child the best educational opportunities possible by securing policies that allow parents to choose options that best meet the needs of their children, and to ensure that public education dollars follow those students.

Amici consider this case to be of special significance in light of its nationwide implications for the roles of local and state governments in educating students. Specifically, Amici's experience in litigating matters involving Proposition 227, along with cases addressing the paramount role of state and local governments in educating students, will provide a useful additional viewpoint to assist this Court in its consideration of this case.

SUMMARY OF ARGUMENT

The voters of the State of Arizona approved Proposition 203, the "English for the Children" statutory initiative, to dismantle the bilingual education system and immerse English learners in the English language. This democratically enacted policy complies with all applicable constitutional and statutory requirements, including the test promulgated in *Castaneda v. Pickard*, 648 F.2d 989, 1008-09 (5th Cir. 1981), the analytical framework most often used by courts to interpret the Equal Education Opportunity Act's (EEOA's) "appropriate action" mandate for English language learners. 20 U.S.C. § 1703(f). In fact, in district court proceedings in the case, the Plaintiffs' own education expert conceded that the educational strategies emanating from Proposition 203 do comport with the EEOA.

The Ninth Circuit erred in substituting its own preference for educating Arizona's students for the validly enacted policy of the people of Arizona. In so doing, the lower court abused its power by abrogating the traditional duty and authority, as recognized on numerous occasions by this Court, of state and local governments to educate their students as they see fit. *See Honig v. Doe*, 484 U.S. 305, 309 (1988) (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

ARGUMENT

I

ARIZONA'S EDUCATION POLICY SATISFIES THE EEOA'S "APPROPRIATE ACTION" MANDATE

The Equal Education Opportunty Act requires that state educational agencies take "appropriate action" to remedy the educational handicaps faced by students not fluent in English. 20 U.S.C. § 1703(f). Congress left to the states the determination of what action is "appropriate." *Castaneda*, 648 F.2d at 1008-09; *Guadalupe Org., Inc. v. Tempe Elementary Sch. Dist. No. 3*, 587 F.2d 1022, 1030 (9th Cir. 1978) (holding that Congress left state and local educational authorities substantial latitude to choose programs and techniques to meet their EEOA obligations). The challenged actions of the state and local policy makers in this case reflect the lawful exercise of their statutory discretion, and the Ninth Circuit erred by substituting its policy preference in place of that lawful exercise.

Courts have applied a three-part test, first articulated by the Fifth Circuit in *Castaneda*, to determine whether an educational program meets the requirements of section 1703(f): (1) the program must be supported by an educational theory that is recognized as sound by some experts in the field, or, at least, deemed a legitimate experimental strategy; (2) the programs and practices of the school system must be reasonably calculated to effectively implement the educational theory; and (3) the program, after an appropriate period, must be evaluated for effectiveness. *Castaneda*, 648 F.2d at 1009-10. Numerous courts have adopted the *Castaneda* test, making it the

predominant analytical framework for interpreting the "appropriate action" standard. *See, e.g., Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1041 (7th Cir. 1987) (applying *Castaneda* framework as "fruitful starting point for our analysis); *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 576 F. Supp. 1503, 1510 (D. Colo. 1983) (following *Castaneda*, "a case which is very instructive in the present controversy"); *Valeria G. v. Wilson,* 12 F. Supp. 2d at 1017 ("Judicial precedent is the only guidance available to this court. . . . The leading circuit court decision on Section 1703(f) is *Castaneda v. Pickard*.").

Every court that has addressed this issue has concluded that the EEOA does not require bilingual education. In fact, as the Ninth Circuit itself held three decades ago, "the issue is whether 'appropriate action' [m]ust include the bilingual-bicultural education the appellants seek. We hold that it need not." *Guadalupe*, 587 F.2d at 1030.

A review of the record in this case reveals that the education policy choice made by the people of Arizona not only satisfies all three *Castaneda* factors, but does so in a manner markedly superior to the failing status quo imposed upon the state by the Ninth Circuit. Decisions in analogous cases in California have validated the opinions of countless education experts that view English immersion programs as sound educational policy. *See Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 703 (N.D. Cal. 1989) (holding as "sound" a program that "stress[ed] English language development intended [for students to] gain fluent English proficiency . . . as quickly as possible, in order to participate in academic classes taught in English"); *Quiroz v. State Bd. of Educ.*, No. Civ. S-97-

1600WBS/GGH, 1997 WL 661163, at *5 (E.D. Cal. Sept. 10, 1997) (California school district's plan to implement "a predominantly English curriculum" based "on the notion that language proficiency is best obtained by lingual immersion" is "within the boundaries of acceptable educational theory.").

Perhaps the most extensive judicial analysis of the efficacy of English immersion techniques was undertaken by the district court for the Northern District of California in *Valeria G.*, 12 F. Supp. 2d 1007. In upholding California's Proposition 227, requiring English immersion, against an EEOA "appropriate action" challenge, the court weighed in on the propriety of English immersion within the *Castaneda* framework:

> [D]efendants present evidence that the sheltered English immersion program of Proposition 227 is also based upon a sound educational theory, which is not only tested but is the predominant method of teaching immigrant children in many countries in Western Europe, Canada and Israel. Defendants present expert opinions that "[t]he common European model is to put all newcomers into a special reception class for one year or, in rare cases two, and then to integrate them into regular classes, with ongoing extra support as needed." They also present evidence that "the advocates and political parties which are most concerned to do justice to immigrant minorities . . . vigorously oppose assigning immigrant children to separate classes and teaching them in their home languages; seeing this as

> a well-meaning but ill-advised strategy leading inevitably to marginalization from the social and economic mainstream." Defendants further present evidence that numerous school districts in this country use structured English immersion methods.

Id. at 1018. The court, following this analysis, held that Proposition 227 satisfied the EEOA's "appropriate action" requirement, as interpreted by prong one of the *Castaneda* test.

The record in this case further reflects that the innovations approved by the people of Arizona would comport with prongs two and three of the *Castaneda* test, while the policies preferred by the Ninth Circuit have miserably failed Arizona's students. The fundamental premise and promise of Proposition 203 are that the open-ended commitment to policies failing Arizona students would be foregone in favor of an innovative system of accountability based on concrete benchmarks for achievement. *See* Petition for Certiorari of Thomas C. Horne at 6 (noting that Proposition 203's enactment led to "significantly lower class sizes, qualified teachers, an abundance of teaching materials, tutoring, and intervention strategies"); Petition for Certiorari of Speaker of the House of Arizona at 14-15 (describing accountability standards).

Without a doubt, the policies chosen by Arizona's citizens to educate their children comply with the EEOA, a conclusion that Plaintiffs' own expert witness at trial did not challenge. *Id.* ("[E]very expert, including Plaintiffs' own witness, testified that by 2006, NUSD conducted effective ELL programs and

met the requirements of § 1703(f).”). Still, the court below found the programs implemented by the school district were in violation of the EEOA.

The contortions necessary for the lower court to support its holding are perhaps best illustrated by the court’s reference to *Lau v. Nichols*, 414 U.S. 563 (1974). Yet *Lau* cannot support the weight the Ninth Circuit puts on it. In *Lau*, this Court examined a Health and Human Services regulation promulgated under Title VI and held that a school district violated the regulation by failing to give equal education opportunities to students of Chinese ancestry who did not speak English. While this Court held that the students were entitled to relief, it pointed out: “No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another.” *Id*. at 564-65.

Lau does not stand for the proposition that school districts must provide bilingual education programs to students who lack proficiency in English. In *Alexander*, 532 U.S. 275, this Court reaffirmed that Title VI “‘proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.’” *Id*. at 280-81 (citation omitted). Language is not an included classification. In discussing *Lau*, this Court wrote that “we have since rejected *Lau*’s interpretation of § 601 as reaching beyond intentional discrimination.” *Id*. at 285.[2] Thus,

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[2] *Almendares v. Palmer*, 284 F. Supp. 2d 799, 804 n.4 (N.D. Ohio 2003), recognized that because of *Alexander*, *Lau* is no longer good law.

the Ninth Circuit in the opinion below relied upon a case interpreting a provision not at issue here.

II

THIS COURT SHOULD ALLOW ARIZONA TO CONDUCT ITS NOVEL SOCIAL EXPERIMENT TO MANAGE ITS EDUCATION SYSTEM

The court below prescribed substantive standards and policies for institutions whose governance is properly reserved to state and local educational agencies, which are better able to assimilate and assess the needs of students in this field. In *United States v. Lopez*, Justice Kennedy wrote that "it is well established that education is a traditional concern of the States." 514 U.S. 549, 580 (1995) (Kennedy, J., concurring). This insight is a part of a larger universe of this Court's cases recognizing that government is composed of sovereign units entitled to a certain amount of latitude in order to experiment with novel solutions to social and political problems. The idea that federalism allows the states to conduct novel, often bold, social, economic, and educational experiments was perhaps most eloquently expressed by Justice Brandeis:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This

> Court has the power to prevent an experiment. . . . But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (footnote omitted).[3]

Returning to *Lopez* and the education context, Justice Kennedy echoed Justice Brandeis's prescription for the Court. "In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." 514 U.S. at 581. His is an observation followed, and presaged, by numerous federal courts recognizing that education is "'perhaps the most important function of state and local governments.'" *Honig*, 484 U.S. at 309 (quoting *Brown*, 347 U.S. at 493).

To make this observation a reality, federal courts must be careful, lest they overstep their bounds by deciding matters of education policy where matters of

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[3] This Court has expressed similar sentiments on numerous occasions. In *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941), this Court described the desirability of federal courts "exercising a wise discretion," and restraining their authority in order to give "scrupulous regard for the rightful independence of the state governments and for the smooth working of the federal judiciary." Similarly, in *Younger v. Harris*, 401 U.S. 37, 44 (1971), this Court explained that federal courts should consciously limit their own powers–in this case, by declining to exercise jurisdiction–based on the notion of "a proper respect for state functions." *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987).

law are settled, and "assume responsibility for making the difficult policy judgments that state officials are both constitutionally entitled and uniquely qualified to make." *Lewis v. Casey*, 518 U.S. 343, 385 (1996) (Thomas, J., concurring). "'[T]he legislature's efforts to tackle [education] problems' should be entitled to respect,"*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972)), because "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools." *Milliken v. Bradley*, 418 U.S. 717, 741 (1974).

Federal courts specifically interpreting the "appropriate action" to overcome language barriers mandate established by the EEOA also have recognized the paramount role played by state and local governments in the educational arena. These courts have recognized that they "are ill-equipped to perform and . . . are often criticized for . . . prescribing substantive standards and policies for institutions whose governance is properly reserved to other levels and branches of our government." *Keyes*, 576 F. Supp. at 1510. So too have these courts noted that "courts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school authorities and the expert knowledge of educators." *Quiroz*, 1997 WL 661163, at *4. As the *Valeria G.* court held in upholding California's Proposition 227:

> This court's responsibility, however, is only to ascertain whether the theory underlying Proposition 227 is informed by an educational theory recognized as sound by some experts in the field or, at least is

> deemed a "legitimate experimental strategy." In light of the evidence submitted, this court must conclude that the English immersion system is a valid educational theory. This court may not go beyond that conclusion and determine whether it is the better theory.

12 F. Supp. 2d at 1019 (citation omitted).

It goes nearly without saying that while such state experimentation can be innovative and unique, it cannot contravene constitutional liberties. "These novel experiments, of course, must comply with the United States Constitution; but their novelty should not be a strike against them." *Chandler v. Miller,* 520 U.S. 305, 324 (1997) (Rehnquist, C.J., dissenting). But in the case before this Court, there are no constitutional challenges being made to Arizona's educational policy. The Ninth Circuit would have done well to heed this Court's direction in *Missouri v. Jenkins*: "[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that [the federal courts] must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution." 515 U.S. 70, 99 (1995).

Unfortunately, Arizona's bold social experiment to teach English language learners English has been usurped by the Ninth Circuit's intervention in education policy making. Amici urge this Court to recognize that Arizona's willingness to carry out this courageous experiment is simply one of the "happy incidents of federalism." This Court should allow Arizona's "novel social experiment" to proceed

unencumbered by the federal court's substituting its values for that of local school authorities.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

DATED: February, 2009.

Respectfully submitted,

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